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IN THE

Supreme Court of the United States

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LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relator, and CHARLES DE FERRY DE FONT-NOUVELLE, Consul General of the French Republic,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER,

[redacted] 7

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER,

[redacted] 8

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND SUPPORTING BRIEF.

FRANK L. POLK,
PORTER R. CHANDLER,
Of Counsel for Petitioners.

THE BALLOU PRESS NEW YORK

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, Lewis J. Valentine, Police Commissioner of New York City, Edward T. V. Fitzgerald, and Charles de

Ferry de Fontnouvelle, Consul General of the French Republic, on behalf of the Government of the French Republic, respectfully pray for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the judgments of that Court entered in the above-entitled cases on January 20, 1936. The transcript of record, including the proceedings in the Circuit Court of Appeals, has been filed herewith in accordance with the Rules of this Court.

Nature of the Case.

These are three writs of habeas corpus, sued out by the relators (respondents here) to prevent their extradition to France as fugitives from justice under the Franco-American Extradition Treaty of 1909. (37 Stat. 1526; Malloy's Treaties, Vol. 3, p. 2580). The three writs were sued out at the same time and present a single question of law. The cases of the three relators were accordingly heard and decided together in the District Court, and on appeal were consolidated by order of the Circuit Court of Appeals (R. 47) and heard and decided upon one printed record.

The three relators are brothers, native-born citizens of the United States, who formerly operated in Paris an institution known as the Travelers Bank. The bank closed its doors, and the relators fled to the United States. Warrants for their arrest were issued in France; and upon their arrival here they were taken into custody by the Police Department of New York City upon a preliminary warrant (R. 14) issued by a United States Commissioner upon the sworn application (R. 10-14) of the Acting Consul General of France, pursuant to Rev. Stats. 5270 (U. S. Code, Title 18, Sec. 651) and Article IV of the Franco-American Treaty (*supra*). The Commissioner's warrant, and the application upon which it is based, charge the relators with larceny and other crimes, all of which are among the list of extraditable offenses specified in Article II of the Treaty.

Immediately upon being taken into custody, before the warrant could be returned to the Commissioner, and before any

extradition hearings could be held before him, the relators sued out writs of habeas corpus. These writs challenged the jurisdiction of the Commissioner upon the ground that *as American citizens, the relators were altogether exempt from extradition under the Treaty, and could not be held for extradition under any circumstances, no matter what the offence.* The correctness of this contention is the sole question here involved.

Upon the return of the writs the American citizenship of the relators was conceded, and the question of law arising therefrom was argued. The District Court (Hayes, J.) after hearing argument and receiving briefs, handed down an oral opinion (R. 20) sustaining the position of the French Government and directing the dismissal of the writs.

Pursuant to this opinion orders were entered (R. 31-34) dismissing the writs and remanding the relators for extradition hearings. The relators appealed; and the Circuit Court of Appeals, by a two-to-one decision (Manton, *J.* dissenting) reversed the District Court, sustained the claim of the relators to exemption from extradition, as a matter of law, upon the ground of their American citizenship, and directed their discharge. The majority opinion of the Circuit Court of Appeals is found at R. 51, the dissenting opinion at R. 57, and the judgments at R. 69-71.

The Question Presented.

The only question presented is whether the relators, because of their American citizenship, are exempt from extradition under the Treaty as a matter of law.

Article I of the Treaty provides that the two Governments

> "*mutually agree to deliver up persons,* who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the

other." (Italics ours throughout this petition and brief.)

The word *"persons"* has been held by this Court to include citizens of the asylum state, as well as all others. *Charlton v. Kelly*, 229 U. S. 447.

Article V of the Treaty, however, goes on to provide:

> "Neither of the contracting Parties *shall be bound* to deliver up its own citizens or subjects under the stipulations of this convention."

We contended below, and the District Court and the dissenting Judge in the Circuit Court of Appeals held, following two decisions of the Queen's Bench Division in England, that this language does not operate to give American citizens an absolute exemption from extradition as a matter of law, but merely renders such extradition discretionary with the Executive,—subject, of course, to a prior judicial hearing and a finding of probable cause of guilt by the magistrate, as in all extradition cases.

The relators, on the other hand, contend, and the majority of the Circuit Court of Appeals held, that the phrase "neither party *shall be bound*", must be construed as equivalent to "neither party *shall be permitted*", and that there is consequently no authority or power in either the Judiciary or the Executive to extradite American citizens to France for any crime whatever.

Reasons for Granting the Writ.

(A) No Applicable Decision by This Court.

This Court has never had occasion to decide the question here presented. The case, we submit, falls clearly within the spirit of Rule 38, and particularly of that portion which mentions cases where a Circuit Court of Appeals

> "has decided an important question of federal law which has not been, but should be, settled by this court."

(B) Importance of the Question.

If the majority of the Circuit Court of Appeals is correct, an American citizen is free to commit in France all the crimes on the calendar; and if he once succeeds in escaping to the United States, no power on earth can punish him, and he can enjoy in security the fruits of his crime. The majority of the Circuit Court of Appeals recognized this when it said (R. 56):

> "It is indeed unfortunate that there should be no way by which the relators can be punished, if they are guilty."

Nor is this all. Even if the case involved merely the application of the single treaty between France and the United States, we believe that its importance would justify the granting of the writ. But the case goes much further than that. The United States now has in force no less than *thirty-two other extradition treaties, all of which contain provisions which are word for word identical with Article V of the French Treaty with respect to the extradition of citizens.** The decision of the Circuit Court of Appeals of necessity extends to all of these treaties, with the same shocking results, and the same inability to punish fugitive offenders, as is now presented in the case of France.

(C) Conflict of Authorities.

As already noted, this Court has never had occasion to decide the question here presented. In only two other instances have the lower courts in this country decided it. The English courts have twice passed upon the question, both times in

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* These treaties include: Austria, 1930; Belgium, 1901; Bolivia, 1900; Bulgaria, 1924; Chile, 1900; Columbia, 1888; Costa Rica, 1922; Cuba, 1904; Denmark, 1902; Dominican Republic, 1909; Esthonia, 1923; Finland, 1924; Germany, 1930; Greece, 1931; Honduras, 1909; Latvia, 1923; Lithuania, 1924; Luxemburg, 1883; Netherlands, 1887; Norway, 1893; Panama, 1904; Paraguay, 1913; Peru, 1899; Poland, 1927; Portugal, 1908; Rumania, 1924; Salvador, 1911; Servia, 1901; Siam, 1922; Spain, 1904; Sweden, 1893; Venezuela, 1922.

favor of our contention. The division of judicial authority may be thus summarized:

(a) *In favor of our position here* (that such language in an extradition treaty gives no absolute exemption, but renders extradition of citizens discretionary with the Executive):

(1) The District Court in the present case.

(2) The dissenting opinion in the Circuit Court of Appeals in the present case.

(3) The Queen's Bench Division (three judges) in *In re Galwey* [1896], 1 Q.B. 230.

(4) The Queen's Bench Division (three judges) in *The Queen* v. *Wilson*, 3 Q.B.D. 42 (1877).

(5) A recent unreported decision of the United States District Court for the Eastern District of Wisconsin (Geiger, J.) in *In re Drossner*,* December 7, 1935.

(b) *In favor of our opponents' position here* (that such language in a treaty gives absolute exemption as a matter of law):

(1) The majority of the Circuit Court of Appeals in the present case.

(2) The United States District Court for the Western District of Texas in *Ex parte McCabe*, 46 Fed. 363 (1891).

The above, so far as we can ascertain, comprise all of the judicial decisions which have been rendered upon this question both in this country and in England.

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* In this case the relator, an American citizen, was committed by the Commissioner for extradition to France under the same Franco-American treaty as is here involved. On *habeas corpus* he contended that he was exempt from extradition because of his American citizenship, using the same arguments as those advanced by the relators in the case at bar. The Court, after argument and briefs, rejected his argument and dismissed the writ. No opinion was written. Our information is furnished by counsel who represented the French Government in that case.

In view both of the dearth and conflict of judicial authority in this country, and of the conflict between the majority of the Circuit Court of Appeals in this case and the Queen's Bench Division in England (the latter representing the views of six Judges, including Lord Russell, C. J., Cockburn, C. J., and Kennedy, L. J.), we submit that an authoritative pronouncement by this Court is essential.

This petition is accordingly presented, not only on behalf of the petitioners of record, but also on behalf of the Government of the French Republic (whose Consul General was admitted as a party respondent in the Courts below, and is a petitioner of record here) to the end that this important question of treaty interpretation may be settled by this Court.

A brief in support of this petition is annexed hereto.

WHEREFORE, your petitioners pray that writs of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to the end that these cases may be reviewed and determined by this Court and that the judgments of the Circuit Court of Appeals may be reversed.

Dated, New York, N. Y., March 5, 1936.

FRANK L. POLK,
PORTER R. CHANDLER,
Of Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court appears at R. 20; those of the Circuit Court of Appeals at R. 51-68. Neither has been reported.

Jurisdiction.

The judgments of the Circuit Court of Appeals now sought to be reviewed were entered on January 20, 1936, and appear at R. 69-71. Jurisdiction of this Court is invoked under Section 240a of the Judicial Code (U. S. Code, Title 28, Sec. 347) and U. S. Code, Title 28, Sec. 463c.

The facts have been stated in the petition (*supra*, pp. 2-3).

ARGUMENT.

I.

The American citizenship of the relators does not bar their extradition as a matter of law, but renders that extradition discretionary with the Executive.

Article I of the Treaty contains the mutual agreement of the parties to *"deliver up persons"* who are fugitives from justice and stand charged with specified crimes. In *Charlton v. Kelly*, 229 U. S. 447, it was argued that the word "persons" must be construed to mean "persons other than citizens of the asylum state." This construction had in fact been uniformly adopted by the foreign government there involved (Italy), which had always refused to surrender its citizens to the United States. This Court, however, unanimously

rejected the argument, and held, notwithstanding the lack of reciprocity thus created, that American citizens were liable to be surrendered to Italy.

The authority to extradite is completed by the enabling statute (Rev. Stats. 5270, U. S. Code, Title 18, Sec. 651) which provides the machinery for provisional arrest, hearing before a magistrate, commitment by the magistrate, and surrender by the State Department to the representative of the demanding government. This statute by its terms comes into operation

> "whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government * * *" and when complaint is made under oath "* * * charging *any person* found within the limits of any State, District or Territory, with having committed within the jurisdiction of any foreign government any of the crimes provided for by such treaty or convention."

So far it is clear that there is no difference in status between American citizens and others; and such was the holding of this court in *Charlton* v. *Kelly, supra.*

But the relators contend that as to their persons the entire application of both Treaty and Statute is nullified by the provisions of Article V, the English and French texts of which are as follows:

"ARTICLE V.	ARTICLE V.
Neither of the contracting Parties *shall be bound* to deliver up its own citizens or subjects under the stipulations of this convention.	Les Parties contractantes *ne seront pas obligées* de livrer leurs propres citoyens ou sujets, en vertu des stipulations du présent traité."

The question is whether this Article, when it says that neither party *"shall be bound"* to extradite its own citizens, means that neither party shall be *permitted* under any circumstances to do so, or whether it means that each party may extradite its own citizens in what it deems to be a proper

case, although it is not bound to do so under the Treaty, so that a failure to extradite cannot be regarded as a breach of the Treaty in any case involving a citizen. Our contention is simply that in the case at bar ample authority for extradition is given by both Statute and Treaty, although by the Treaty the Executive is granted a discretionary power to refuse extradition in the case of American citizens.

This has been the holding of the English courts in a precisely similar case.

In *In re Galwey* [1896], 1 Q.B. 230, a British subject was held for extradition to Belgium. The Anglo-Belgian Treaty provided, in language considerably more emphatic than that of the Franco-American Treaty:

> "In no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalization."

The prisoner, relying upon this provision of the Treaty, sued out a writ of *habeas corpus*, contending that the committing magistrate had no jurisdiction under the Treaty to make an order for his extradition.

The Court, however, held to the contrary. Lord Russell, C.J. (Wright and Kennedy, JJ. concurring) said at p. 235:

> "What does that mean? It surely means that, while they are not bound, they may under the treaty and any legal enactment which relates to the treaty make such extradition."

The Court accordingly held that under the language quoted it was within the discretion of the Executive whether or not to surrender a British subject, and that he was not entitled to exemption as a matter of law.

This decision, we submit, is directly applicable to the present situation. It will be remembered that in England, as here, there can be no claim of any general sovereign discretion or authority to extradite independently of treaty or statute, since it is settled law that the Crown cannot, in the absence of statutory authority, send a British subject outside

the realm for trial. *Halsbury's Laws of England,* Volume 14, page 404.

The lawful authority for extradition in England is substantially identical with that in the United States. The authority of Parliament given by the Extradition Act of 1870 (33 and 34 Vict. c. 52) corresponds to our Revised Statutes 5270 (U. S. Code, Title 18, Section 651, *supra,* p. 9). The Extradition Act, like our Statute, by its terms comes into operation only where there is an applicable Treaty; and in both countries, therefore, extradition is predicated upon the combined effect of the Statute and Treaty, the language of the Treaty being in each case the decisive factor. In *In re Galwey, supra,* as already noted, the language of the Treaty before the Court that "In no case, *nor on any consideration whatever*" should the parties be bound to surrender their own subjects, was considerably stronger for the relator than the language of the Franco-American Treaty in the case at bar; yet the Queen's Bench Division found no difficulty in holding that this Treaty gave ample authority for the extradition of a British subject.

Lord Russell in his opinion pointed out the difference between a treaty which provides that *"neither party shall be bound"* to surrender its own citizens and a treaty which provides that *"no citizen shall be surrendered"*, citing *The Queen* v. *Wilson,* 3 Q.B.D. 42 (1877).

In *The Queen* v. *Wilson,* a British subject was held for extradition to Switzerland under a treaty which provided

> "that no subject of the United Kingdom *shall be delivered up* by the Government thereof to Switzerland."

It was accordingly held in that case, in view of the language of the Treaty, that there was no authority to extradite a British subject in any event and that the Courts were bound to grant him a discharge on *habeas corpus.* The Court reached this conclusion with obvious reluctance. Cockburn, C. J., characterizing the result as "a blot upon the law." Mr. Justice Field, in his concurring opinion,

pointed out the difference between the language of the Swiss Treaty and the language of treaties which provided simply that *"neither party shall be bound"* (thus foreshadowing the later decision in *In re Galwey*), saying (3 Q.B.D. at p. 46):

> "Is there not in this very treaty an exception? It is not that one country *shall not be bound* to deliver up, but that no subject *shall be delivered up* to the other country."

Apart from the majority opinion of the Circuit Court of Appeals in the present case, the only judicial decision on either side of the Atlantic opposed to our position is that of the District Court for the Western District of Texas in *Ex parte McCabe*, 46 Fed. 363 (1891).

In that case the Court (Maxey, J.) was called upon to interpret the Mexican Extradition Treaty of 1861*, the relevant language of which was identical with that of Article V of the Franco-American Treaty above quoted. An American citizen (a woman) was charged with murder committed in Mexico. Upon being arrested and held for an extradition hearing, she immediately sued out a writ of *habeas corpus*, claiming that as an American citizen she could not lawfully be surrendered to the Mexican authorities.

The District Court sustained the writ and directed her discharge. After holding (46 Fed. at pp. 368-9) that the committing magistrate had no jurisdiction to act since there has been no complaint *on oath* as required by statute (a ground sufficient in itself to dispose of the case), the Court went on to consider the interpretation of the Treaty and the claim of American citizenship. After holding that in the absence of treaty or statutory authority there was no obligation to extradite fugitives, the Court concluded that the words "neither of the contracting parties shall be *bound* to deliver up its own citizens" meant that neither contracting party should be *permitted* to do so, that the Executive con-

* 12 Stat. 1199; Malloy's Treaties, Vol. 1, p. 1125.

sequently had no discretion to permit the surrender of an American citizen in any case, and that Mrs. McCabe was therefore entitled to discharge as a matter of right.

The Court appears to have been of the opinion that because the Mexican Treaty stated that neither party "shall be bound" to extradite its own citizens, therefore no authority for such extradition was granted by the Treaty. This, we submit, is a *non sequitur*. The Treaty itself (and this is equally applicable to the Franco-American Treaty now before us) furnishes the authority for extradition when it says (Franco-American Treaty, Article I) that the two Governments

> "*mutually agree to deliver up persons* who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other."

Under every extradition treaty, supplemented by the enabling statute, four distinct requirements for extradition exist in every case:

1. There must be a treaty with the foreign state from which the accused is a fugitive.

2. The accused must be charged with one of the crimes provided for in that treaty.

3. A judge or magistrate must, after full hearing, determine that there is evidence sufficient to sustain the charge, and certify his findings and evidence to the Secretary of State.

4. The Secretary of State may thereupon (and not before) surrender the accused to the foreign government.

It is to be noted that under the Statute the final word on extradition is in every case with the Executive. Even after the magistrate has decided that there is evidence sufficient to warrant extradition, the Secretary of State may nevertheless refuse to surrender the culprit. Where the Treaty

obligation is unqualified (as it would be for example, in the case of a *French* citizen fleeing from France to the United States) the Secretary's refusal to surrender might constitute a breach of the Treaty, entitling the foreign Government to make diplomatic remonstrances or even to declare the Treaty at an end; but this would be the responsibility of the State Department and not of the judiciary. The present Treaty, by providing that neither party *"shall be bound"* to extradite its own citizens, means simply that the Executive may do so or not in its discretion, and that a refusal to extradite an American citizen cannot be taken as a breach of the Treaty obligations. France cannot complain that the Treaty has been broken if the Executive refuses to surrender an American citizen who has committed an extraditable offense. The citizen cannot complain that his rights have been infringed if the Executive consents to surrender him after the magistrate has certified that there is probable cause for believing him guilty. The matter is for the diplomatic discretion of the Executive.

The function of the committing magistrate, as distinguished from the Executive, is simply to determine (1) whether the offense charged is within the Treaty, and (2) whether there is probable cause sufficient to warrant the committal of the accused for trial. *Charlton* v. *Kelly,* 229 U. S. 447, 459-68; *Collins* v. *Loisel,* 259 U. S. 309, 314-15. It then becomes the duty of the Secretary of State in his discretion to decide whether extradition will be granted, notwithstanding the citizenship of the accused.

This, as already noted, has been the precise holding of the English courts upon this issue, as well as of the District Court and the minority of the Circuit Court of Appeals in the case at bar.

II.

Nothing in the situation of the parties or the background of the Treaty compels the interpretation for which respondents contend.

It is an accepted principle that treaties, particularly those relating to extradition, are to be construed in a broad and liberal sense, and that that construction is to be preferred which is the most liberal in its scope and the most likely to promote the ends of substantial justice. *Factor* v. *Laubenheimer,* 290 U. S. 276, 293, and cases there cited.

The construction for which the respondents contend is clearly narrow and restricted, and is in fundamental conflict with the fundamental purpose of the Treaty, expressed in its preamble, that the parties are "desirous to promote the cause of justice".

The argument of respondents below, and the majority opinion of the Circuit Court of Appeals, both proceeded upon the ground that the background of the Franco-American Treaty of 1909, and the practical construction claimed to have been given by the State Department, compelled the conclusion that Article V operates as a mandatory exemption of citizens, to the exclusion of all discretion or authority in either the courts or the Executive. This argument rests upon a number of items which we shall endeavor to analyze *seriatim.*

(a) *The Background of the Franco-American Treaty of 1909.*

The only previous extradition treaty with France was that of 1843 (8 Stat. 580; Malloy's Treaties, Vol. 1, p. 526.) This treaty was wholly silent on the subject of citizens, and contained an unqualified obligation to surrender all *persons.* A conflict of opinion arose, of the type apparently inevitable between countries following the civil law (where jurisdiction

over crime is personal as well as territorial) and countries following the common law (where jurisdiction over crime, with rare exceptions, is territorial only). Civil law countries generally claim the right to try their own citizens for crimes committed abroad, and on this ground are generally reluctant to extradite them. Common law countries, on the other hand, claim no jurisdiction to try their own citizens for crimes committed abroad, with the result that unless extradition is granted the crime remains unpunished. The existence of this perennial conflict is well illustrated by the arguments and diplomatic correspondence set forth in the report of *Charlton* v. *Kelly*, 229 U. S. 447.

Under the prior Franco-American Treaty, therefore, the United States was in a position to claim (according to its interpretation of such treaties, as subsequently sanctioned by this Court in *Charlton* v. *Kelly*) that France was *bound* to surrender her own citizens to us. France, on the other hand, had regularly refused to do so, pointing out that they could be punished at home.

In this posture of affairs the present Treaty was executed, containing in Article V a provision with respect to citizens which had been absent from the former treaty. The relators argue, and the Circuit Court of Appeals apparently held, that the purpose of this insertion must of necessity have been to provide for a complete surrender of the position of the United States in favor of the traditional civil law attitude, and to exempt the citizens of both parties unconditionally and absolutely from all extradition. This amounts to saying that by the change in the treaty the representatives of the United States deliberately and intentionally adopted a policy (not possible under the former treaty) of granting unconditional asylum, and immunity from all punishment, to any of its citizens who might succeed in making their escape to American soil after committing crimes in France.

The shocking results of this policy are apparent; and there are the strongest practical reasons why such results should not be reached through process of speculation, in the absence of the most compelling proof. On the contrary, we submit

that a much more reasonable assumption is that the parties desired to avoid the embarrassment which had resulted from France's refusal to surrender her own subjects under the earlier treaty, and at the same time to prevent the miscarriages of justice which would result if citizens were held absolutely exempt from extradition. With this end in view, the treaty was revised to provide that extradition on both sides should be henceforth discretionary and not mandatory.

This view finds strong support in contemporary history.

The Franco-American Treaty was signed on January 6, 1909. Only a few months before, in October 1908, an amendment had been signed to the extradition treaty between France and Great Britain, covering the question of extradition of citizens in the following language:

> "Each of the high contracting parties shall be free to refuse (sera libre de refuser) to the other the extradition of its own citizens."

Prior to that time the Franco-British Treaty had contained a flat prohibition on the extradition of citizens, which had led to the same unfortunate results as those presented in *The Queen* v. *Wilson, supra.* Oppenheim on International Law, 4th Ed. (1928), Vol. 1, p. 569.

The amendment to the British Treaty and the new American Treaty were laid before both Houses of the Frence Parliament at nearly the same time in the spring of 1909. Each was accompanied, under French parliamentary practice, by an "exposé des motifs", which is in the nature of an official introductory statement by the Government for the information of the House. In the exposé des motifs accompanying the American Treaty it was said:

> "Article V gives to the two contracting parties the right not to deliver (le droit de ne pas livrer) their nationals. This general principle which is part of our public law did not appear expressly in our previous treaties with the United States. The insertion of this provision has seemed useful to prevent any difficulty of interpretation." Documents Parlementaires (1909), Chambre des Deputés, Annexe 2391.

In the exposé des motifs accompanying the British Treaty it was stated clearly that the modification was made, not only to permit France to be free to refuse extradition of its own citizens, but also to prevent crime from going unpunished, by giving to the British Government the right to extradite British subjects. The exposé ends by saying that the new language will—

> "permit the British Government to make possible by the extradition of its nationals the repression which it cannot exercise itself and thus crimes committed on our territory will no longer be liable to remain unpunished." Documents Parlementaires (1909), Sénat, Annexe 2338.

From the foregoing it is apparent that it was never the intention of France, at any rate, by language such as that contained in Article V of the present Franco-American Treaty, to *prohibit* extradition of citizens under all circumstances. On the contrary, it clearly appears to have been the understanding of France, at the time the treaty was executed, that such a clause rendered extradition in such cases discretionary.* The revision of the British and American treaties, carried out at the same time, illustrate the working of this fundamental principle under converse sets of circumstances. The British Treaty had forbidden extradition of citizens in every case. It was revised to *permit* such extradition, by language which stated simply that either party "shall be free to refuse". The earlier American Treaty had provided (according to the American interpretation at least) for an unqualified obligation to extradite citizens in all cases. It was revised to make this discretionary, by the use of the words "neither party shall be bound". In both cases the change in language was designed to reach the same result,—i.e. to make extradition of citizens possible at the discretion of the asylum state.

Viewed in this light, the Treaty of 1909 is a perfectly reasonable compromise between the conflicting views of crimi-

* French text-writers uniformly hold the same view. (*Infra*, p. 22.)

nal jurisdiction held by the parties. The existence of a discretion renders the Treaty workable and furthers the administration of justice for which it was designed. If the United States has no discretion to surrender its citizens, then a complete miscarriage of justice results, since no American courts can try them. If on the other hand a discretion exists, which is all we contend for, such miscarriages can be prevented.

(b) *The claim of "Practical Construction" by the State Department.*

We have alluded already to the decision of the District Court in *Ex parte McCabe,* rendered under the Mexican Treaty of 1861, which contained language identical with that of the Franco-American Treaty of 1909.

The Court in that case placed great reliance upon the fact that in four instances (set forth in its opinion) occurring between 1877 and 1891, the State Department had construed the language of the Mexican Treaty as prohibiting the extradition of citizens of either party.

Even if it be assumed (and there is no authority for making any such assumption) that the rulings made by the State Department some forty years ago in the case of the Mexican Treaty would be applied by the State Department at the present day to the Treaty now before the Court, the fact remains that the construction of a treaty is fundamentally for the judiciary, and that "practical construction" by the Executive, while entitled to respectful consideration, is in no sense conclusive. This is well illustrated by the decision of this Court in *United States v. Rauscher,* 119 U. S. 407, 415-16. In that case the question was whether a fugitive criminal extradited to the United States for one offense could be tried on his arrival for a different one. The State Department (see 119 U. S. at p. 415) had construed the treaty then before this Court as authorizing trial of the accused for a different offense. Arguments in support of this construction

were advanced at the bar by the Solicitor General. The British Foreign Office, on the other hand, had adopted the opposite view. This Court rejected the construction of the State Department and adopted that of Great Britain.

As pointed out in the dissenting opinion in the Circuit Court of Appeals in the case at bar (R. 63-4), the construction by the State Department upon which the Court relied in *Ex parte McCabe, supra,* was the exact opposite of that which had been adopted, with respect to the same treaty, by the Supreme Court of Mexico and apparently also by the Mexican Foreign Office. It led to such embarrassment that in 1899, when a new Treaty* was negotiated with Mexico, the disputed article was changed to read as follows:

> "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, *but the Executive authority of each shall have the power to deliver them up, if, in its discretion, if be deemed proper to do so.*" (Art. IV.)

Substantially similar language is found in six other extradition treaties†.

Upon this alteration of the Mexican Treaty the majority of the Circuit Court of Appeals in the present case bases a further argument, which in effect is this: At the time the Franco-American Treaty was negotiated in 1909, the parties had before them the precedent of the Mexican amendment of 1899, which contained an express grant of discretion; and their failure to incorporate the same express grant in the Franco-American Treaty compels the conclusion that they intended deliberately to exclude discretion.

We submit, however, that the insertion of express words stating that the parties *may* surrender their own citizens although they are not *bound* to do so adds nothing to the force of the Treaty, and that these words have been inserted on occasion simply from an abundance of caution on the part

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* 31 Stat. 1818; Malloy's Treaties, Vol. 1, p. 1184.

† Japan, 1886; Argentina, 1896; Orange Free State, 1896; Guatemala, 1903; Nicaragua, 1905; Uruguay, 1905.

of the draftsman.* The Anglo-Belgian Treaty which was before the Court in *In re Galwey, supra,* contained no such provision. Its language on its face stated unequivocally and without qualification that neither party *"shall be bound"* to extradite its own citizens; yet the Queen's Bench Division had no difficulty in holding that these words implied the existence of a discretionary power. Mr. Justice Field in *The Queen* v. *Wilson, supra,* was of the same opinion.

When the parties met to negotiate the Franco-American Treaty of 1909, they had before them, as already noted, a prior treaty under which the United States was unequivocally bound to surrender its citizens to France. No cases had arisen, similar to those arising with respect to Mexico, of American citizens committing crimes in France and returning to remain unpunished in the United States. There is nothing to indicate that either the rulings of the State Department some twenty years earlier on the Mexican Treaty, or the decision of Judge Maxey in *Ex parte McCabe,* were present in the mind of either party at the time the French Treaty was negotiated.

Textwriters on international law have classified extradition treaties under three heads:

1. Those which contain an absolute and unqualified obligation to surrender all persons, including citizens of the asylum state (such as our present Treaty with Great Britain, our former treaty with France, and the Treaty with Italy which was before this Court in *Charlton* v. *Kelly*);

2. Those which contain an express provision that citizens of the asylum state "shall not be surrendered"

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* As stated in the dissenting opinion in the present case, the reason for the amendment of the Mexican Treaty in 1899

> "was merely to clear up doubts, cast upon the plain meaning of the provisions of Article VI of the 1861 Convention, by an erroneous executive construction accepted without question by an inferior federal tribunal in the McCabe case. The amended provision attempts to clarify, but not to amplify, the short statement of Article VI of the 1861 Convention. It adds nothing, because where the country *is not bound* but *may* surrender, discretion is necessarily implied." (R. 65.)

(such as the Anglo-Swiss Treaty which was before the Court in *The Queen* v. *Wilson*);

3. Those which give to the asylum state a discretion to surrender its own citizens or not, as the Executive may decide in each case.

The present Franco-American Treaty, and other treaties containing similar language, are regularly classified by modern authorities under the third of these categories, along with treaties which, like the Mexican treaty above quoted, contain express words of discretion. *Oppenheim on International Law* (4th Ed. 1928), Vol. I, p. 569; *Saint Aubin—L'extradition et le droit extraditionnel* (1913) Vol. 1, p. 309; *Travers—Droit Pénal International* (1922) Vol. V, p. 28; Travers—*L'Entraide repressive internationale et la loi française du 10 Mars 1927* (1928) pp. 169-70.

(c) *The alleged distinction between the present case and In re Galwey, supra.*

Upon its face the decision of the Queen's Bench Division in *In re Galwey* is clearly an authority for our contentions. The majority of the Circuit Court of Appeals, however, refused to follow it upon the ground that the circumstances under which that decision was rendered were different from those here involved. We quote from the majority opinion as follows (R. 54):

"A ruling of an English court, (In Re Galway (1896) 1 Q.B. 230), merely goes to show how completely the clause should be interpreted by its history. Before 1887 the extradition treaty between Belgium and Great Britain had forbidden any surrender of nationals at all. Regina v. Wilson, 3 Q.B. 42. In that year it was amended and what we have called the Prussian clause [i.e.—a clause similar to that contained in the Franco-American Treaty] was substituted. Obviously the amendment meant to make a change; it would make none at all, if the court continued to treat it as an exemption. The situation was just the reverse of that before us now; that

is, an amendment to modify a treaty which had compelled the surrender of all nationals. Nothing relevant for us can therefore be inferred, because In Re Galway held that a discretionary power had been conferred."

Obviously the amendment to the Anglo-Belgian Treaty in the *Galwey* case had to be given some meaning. It is equally obvious that the language of the new Franco-American Treaty here must be given some meaning, and that the parties intended to make *some* change from the earlier language of the 1843 treaty. But there is no authority whatever for assuming that the change which the parties intended was that which the Circuit Court of Appeals has held—i.e. a change from an absolute obligation to surrender citizens in every case to an absolute prohibition against surrendering them at all.

If *that* had been the intention of the parties, they could easily have expressed it by incorporating in the 1909 treaty a clause such as that which had been presented in *The Queen* v. *Wilson, supra,* to the effect that:

"No citizen of either party *shall be surrendered.*"

Or they could have followed the precedent of Art. XXIV of the treaty between the United States and the Two Sicilies of 1855* (the only American treaty of the kind), which provided that:

"The citizens and subjects of each of the High Contracting Parties *shall remain exempt* from the stipulations of the preceding articles."

Or they could have copied, in Article V of the Franco-American treaty, the mandatory wording used in Articles VI and VIII of the very same treaty, which clearly exclude all discretion with respect to extradition for political offenses

* 11 Stat. 639, 653; Malloy's Treaties, Vol. 2, p. 1814, 1822.

and those barred by the statute of limtations (*infra,* pp. 24-25).

But the parties did nothing of the kind. Instead, they adopted language which, on its face, certainly shows no intention to confer an absolute exemption. Not only is there no authority for saying that any such intention existed; but on the contrary, as pointed out above (*supra,* pp. 16-19), it is far more reasonable to assume that the new language represented a compromise between the views of the two parties, and that the change was from an absolute and unqualified obligation to surrender citizens in all cases to a qualified or discretionary obligation to do so or not, as the Executive might deem fit.

III.

A comparison of the discretionary language of Article V of the Franco-American Treaty with other provisions intended to exclude discretion supports our argument.

We may further distinguish the discretionary language that a party "shall not be bound" to surrender its own citizens with the language regularly used in other phases of extradition treaties when it is intended that a particular subject should be completely excluded from the operation of the treaty and no opportunity left for discretion.

In nearly all extradition treaties, there is found in the same document the discretionary provision that neither party *"shall be bound"* to extradite its own citizens and also the mandatory provision that extradition *"shall not be granted"* in specified cases, such as those involving political offenses, offenses barred by the Statute of Limitations, offenses committed prior to the Treaty, etc. Thus in the

Franco-American Treaty of 1909, now before the Court, we find:

> Art. V—Neither party *"shall be bound"* to extradite its own citizens.
>
> Art. VI—Fugitive criminals *"shall not be surrendered"* for political offenses.
>
> Art. VIII—Extradition *"shall not be granted"* where prosecution is barred by the Statute of Limitations of the asylum state.

The contrast between the mandatory and discretionary language of the two types is clearly apparent.

In nearly every extradition treaty ever concluded by the United States, the same contrast is present. Thus in Article III of the Treaty with Brazil of 1897 (33 Stat. 2091; Malloy's Treaties, Vol. 1. p. 148) it is provided:

> "Extradition *shall not be granted* if the offense on which the surrender is demanded be of a political character."

Article V of the same Treaty provides:

> "The contracting parties *shall in no case be obliged* to surrender their own citizens in virtue of the stipulations of the present treaty."

And Article VIII of the same Treaty provides that extradition *"shall be refused"* where prosecution is barred by the Statute of Limitations of the asylum state.

Other examples could be multiplied indefinitely.

CONCLUSION.

It is accordingly respectfully submitted that writs of certiorari should be granted to the end that the decision of the Circuit Court of Appeals may be reversed and the relators remanded for the purpose of extradition hearings according to law.

Respectfully submitted,

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